

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7219

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7219

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

- against -

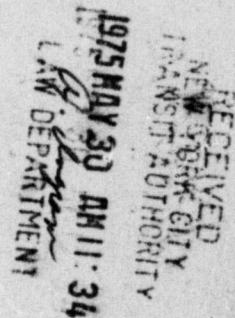
CHIEF OF TRANSIT POLICE, and CHAIRMAN and
MEMBERS OF THE BOARD OF THE NEW YORK CITY
TRANSIT AUTHORITY,

Defendants-Appellees.

APPENDIX ON APPEAL

JOHN G. de ROOS, Esq.
General Counsel,
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201
Attorney for Defendants-Appellees

HERBERT JORDAN
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
Attorney for Plaintiffs-Appellants.



PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceeding</u>
February 21, 1975	Complaint filed. Summons issued.
February 24, 1975	Notice of Motion for preliminary injunction ret March 7, 1975 filed.
February 24, 1975	Plaintiffs' memorandum in support of motion for preliminary injunction filed.
March 19, 1975	ANSWER filed.
March 19, 1975	Affidavit of John G. de Roos and memorandum of law in opposition to plaintiffs' motion for a preliminary injunction filed.
March 20, 1975	Plaintiffs' reply brief filed.
April 4, 1975	By BRUCHHAUSEN, J. -Memorandum and Order dtd 4-4-75 denying motion for preliminary injunction filed. (p/c mailed)
April 8, 1975	Notice of Appeal filed. Copy sent to Court of Appeals. JN

Complaint

Bruckhauser, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
PAT WRIGHT and JACK LIEBERMAN :

Plaintiffs, :

-against- :

CHIEF OF TRANSIT POLICE, and CHAIRMAN :
and MEMBERS OF THE BOARD OF THE NEW :
YORK CITY TRANSIT AUTHORITY, :

Defendants. :

75C 272

Civil Action NO.

COMPLAINT

-----X
Plaintiffs, by their attorneys, allege:

1. This case arises under the Constitution, Amendments I and XIV, and under 42 U.S.C. § 1983. Jurisdiction is conferred by 28 U.S.C. §§ 1331 and 1343(4).

2. The amount in controversy exceeds \$10,000 exclusive of interest and costs.

3. Plaintiff Pat Wright resides at 95 Eastern Parkway, Apt. 1D, Brooklyn, New York. Plaintiff Jack Lieberman resides at 504 West 110th Street, Apt. 9D, New York, New York.

4. The defendants are the Chairman and Members of the Board of the New York City Transit Authority, and the Chief of Transit Police, an officer of the New York City Transit Authority. Defendants are headquartered at 370 Jay Street, Brooklyn, New York.

5. At all times referred to below, defendants acted in their official capacities under color of state law. They are sued in their official capacities.

Complaint

6. Plaintiffs are members of the Socialist Workers Party ("SWP").

7. The SWP is a nationwide political party which seeks to bring socialism to the United States through distribution of literature, electioneering and other lawful and orderly methods. The SWP seeks and finds its largest constituency among the working class.

8. As a means of communicating the ideas and programs of their party and its candidates, plaintiffs spend one to two hours per week selling copies of The Militant and Young Socialist newspapers in streets and other public places.

9. The Militant and Young Socialist contain analysis and reporting of current events from a socialist perspective and, in recent years, the papers have supported most of the programs and electoral candidates of the SWP.

10. Plaintiffs' method of selling The Militant and Young Socialist is to display the papers by hand and to converse with interested persons about socialism and about the content of the papers.

11. Prior to and during the month of December, 1974, plaintiffs sold copies of The Militant and Young Socialist in subway stations of the New York City Transit Authority.

12. The subway stations are spacious, underground areas, many of which are lined with shops, newsstands, vending machines, lunch counters and similar facilities, and which contain large numbers of working class people.

Complaint

13. During December of 1974, officers of the New York City Transit Police ordered plaintiffs to stop selling The Militant in subway stations and threatened to ticket plaintiffs if they did not stop.

14. By letter dated January 28, 1975, plaintiffs notified the defendants of their desire to sell papers in the subway stations and expressed willingness to abide by reasonable regulations as to specific time, manner and place of selling within the stations. Plaintiffs requested defendants to instruct the transit police officers not to interfere further with such selling.

15. By letter of Mr. John G. de Roos, General Counsel of the New York City Transit Authority, dated February 13, 1975, defendants denied plaintiffs' request, stating that the "sale of 'The Militant' in the manner you propose is prohibited by Transit Authority regulations."

16. Plaintiffs have stopped selling papers in subway facilities, but desire to resume if the threat of adverse action by the police officers is eliminated.

17. By prohibiting plaintiffs from selling The Militant and Young Socialist in the subway stations, defendants prevent plaintiffs from propagating their ideas in a proper place through their method of selling publications in conjunction with personal contact and peaceful discussion, in violation of the First Amendment and 42 U.S.C.A. § 1983.

Complaint

d- 18. As a result of the acts of defendants and their subordinates, plaintiffs have suffered and are suffering irreparable injury, in that they are prevented from propagating their ideas and from building support for their party, its programs and candidates, by means of selling papers in the subway stations, and plaintiffs will continue to sustain like injury unless the defendants are restrained by this court.

19. Plaintiffs have not previously sought relief in this or another court.

WHEREFORE, plaintiffs request judgment in the form of:

1. A declaratory judgment that plaintiffs are entitled to sell The Militant and Young Socialist in person in the subway stations of the New York City Transit Authority, subject to reasonable regulations as to time, manner and place.

2. A permanent injunction, restraining the defendants, their agents, privies, successors and assigns, and all persons acting in concert with them or with knowledge of the judgment, from interfering in any way with the selling of The Militant and/or Young Socialist by plaintiffs in person in the subway stations of the New York City Transit Authority, subject to reasonable regulations as to time, manner and place; and

Complaint

3. Such other relief as may be just and proper.

Herbert Jordan

HERBERT JORDAN

Rabinowitz, Boudin & Standard
Bill of Rights Foundation
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640
Attorneys for Plaintiffs

Dated: New York, New York
February 21, 1975

Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
PAT WRIGHT and JACK LIEBERMAN, :

Plaintiffs, :

--against-- :

CHIEF OF TRANSIT POLICE, and CHAIRMAN :
and MEMBERS OF THE BOARD OF THE NEW :
YORK CITY TRANSIT AUTHORITY, :

Defendants. :

Civil Action No. 75 C 272

NOTICE OF MOTION
FOR PRELIMINARY
INJUNCTION

1975 FEB 24 PM 3:55
NEW YORK COUNTY
CLERK'S OFFICE
IN DEPARTMENT

-----X
S I R S :

PLEASE TAKE NOTICE that on March 7, 1975, at 10:00 A.M., at the Courthouse of the United States District Court for the Eastern District of New York, at 225 Cadman Plaza East, Brooklyn, New York, plaintiffs will move pursuant to Rule 65 of the Federal Rules of Civil Procedure for an order of preliminary injunction restraining the defendants, their agents, subordinates and privies, and all persons acting in concert with them or with knowledge of the order, from preventing, obstructing or interfering with the sale by plaintiffs of copies of The Militant and/or Young Socialist newspapers in New York City subway stations, subject to reasonable regulation as to specific time, manner and place of selling within the said stations, and further restraining the said defendants and others from ticketing, arresting, prosecuting or in any way penalizing plaintiffs on account of such sales, pending final judgment.

Motion for Preliminary Injunction

This motion is based upon the annexed affidavits of Pat Wright and Jack Lieberman, and the accompanying memorandum of law.

Oral argument is requested.

Herbert Jordan

HERBERT JORDAN

Rabinowitz, Boudin & Standard
Bill of Rights Foundation
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640
Attorneys for Plaintiffs

Dated: New York, New York
February 24, 1975

TO:

Chairman and Members of the Board
of the New York City Transit
Authority
Chief of Transit Police
370 Jay Street
Brooklyn, New York 11201
Att: John G. DeRoos, General Counsel

Affidavit of Pat Wright

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
PAT WRIGHT and JACK LIEBERMAN, :

Plaintiffs, : Civil Action No. 75 C 272

-against- :

CHIEF OF TRANSIT POLICE, et al., :

AFFIDAVIT

Defendants. :
-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

PAT WRIGHT, being duly sworn, deposes and says:

I am a plaintiff in this action.

I am a member of the Socialist Workers Party (SWP).

I am familiar with the history, policies, and practices of the SWP and its local members as described below.

The SWP is a national political party which seeks to bring socialism to the United States by means of electioneering, distribution of publications, public speaking and other lawful and orderly methods.

Candidates of the SWP have appeared on ballots in every Presidential election since 1948, and in innumerable other federal, state and local elections. In 1972, the Presidential and Vice Presidential candidates appeared on the ballot in 23 states. In the 1974 general elections our candidates for Governor, Lt. Governor and Attorney General of the

Affidavit of Pat Wright

State of New York were on the statewide ballot, and our candidates for U.S. Congress, mayor and other officers appeared on the ballot in New York City.

The SWP seeks and finds its largest constituency among the working class.

As a means of attempting to build support for socialist ideas and candidates, other members of my party and I sell copies of The Militant and Young Socialist newspapers on streets and in other public places. I spend an average of one to two hours per week selling the papers. The same is true of most other SWP members whom I know. I sell an average of about ten papers per week.

The Militant and Young Socialist are published in New York City. The Militant, a socialist newsweekly, began publishing in 1928. A typical issue contains about 30 pages of socialist analysis of current events and trends. In recent years the paper has endorsed all programs and candidates of the SWP. It sells for 25¢ per copy.

Young Socialist is published monthly. It was founded in 1957. A typical Young Socialist is shorter than The Militant and contains more general articles and somewhat less coverage of current events. Like The Militant, Young Socialist endorses the candidates and most programs of the SWP. It is pitched towards an audience of students and other young people. It also sells for 25¢.

Affidavit of Pat Wright

The papers contain virtually no advertising except as to other socialist literature. Copies of recent issues of both papers are annexed to this affidavit for reference.

My local group of SWP members purchases the papers in bulk from the publishers. The cost is 17¢ per copy of The Militant and 12-1/2¢ per copy of Young Socialist. Each week, I obtain a supply of about 15 papers from local headquarters and sell as many as possible. I return all sale proceeds to the local headquarters. Other local members do the same. In some weeks, our group has left-over, unsold papers which must be given away or discarded. If the sale proceeds exceed our outlay to the publishers, the entire excess goes to help support our local political activities.

I have read the affidavit of Jack Lieberman, and I use the same method of selling and personal discussion as described by Mr. Lieberman. I have seen a number of other members of my party sell papers, and they all use the same basic method.

I have been selling papers in this way for about two years in all seasons. I have learned that it is very difficult to sell papers on the streets during winter months, or on rainy days in any season. On bad days it takes about two or three times as long to sell a given number of papers as when the weather is good. If the weather is very bad, selling on the street is impossible.

Affidavit of Pat Wright

In bad weather I have often sold papers in subway stations, and sales in the stations are usually good. Even when the weather is nice, subways are a good place to sell, because they contain large numbers of the working class people who are most receptive to our party's ideas.

In early December, 1974, I entered the Franklin Avenue IRT station in Brooklyn to sell copies of The Militant. I sold several copies. While making a sale, I notice a uniformed transit policeman watching me. After I finished the sale, the policeman told me that I could not sell papers in the subway station. I told him I thought I could sell there as I had often done it before. He said I absolutely could not. At that point, another man came up and said he wanted to buy a paper. The policeman said, "You can't buy it from her here, because she can't sell it here." I did not make that sale. The policeman then repeated to me that I could not sell papers in the station and told me that he would give me a ticket unless I obeyed him. I then left the station.

I want to continue selling papers in subway stations, but I do not want to be ticketed or arrested. So I have stopped selling in subway stations until I can establish my legal right to do so without threat of ticketing, arrest or other interference.

Pat Wright
PAT WRIGHT

Sworn to before me, this
21 day of February, 1975.

Herbert Jordan

HERBERT JORDAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4506163 Qual. in N. Y. County
Commission Expires March 30, 1975

Affidavit of Jack Lieberman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
PAT WRIGHT and JACK LIEBERMAN, :

Plaintiffs, :

v. :

Civil Action No. 75 C 272

CHIEF OF TRANSIT POLICE, et al., :

Defendants. :

AFFIDAVIT

-----X
STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

JACK LIEBERMAN, being duly sworn, deposes and says:

I am a plaintiff in this action. I am a member of
the Socialist Workers Party.

Each week I sell copies of The Militant and Young
Socialist newspapers in streets, subways, and other public
places. These papers contain analysis of current events from a
socialist perspective which is consistent with my own and that
of my party. Also, in recent years, the papers have expressly
endorsed the candidates and programs of the Socialist Workers
Party.

My only reason for selling the papers is to attempt to
communicate the ideas and programs of my party and its candidates.
I turn in all sale proceeds to local party headquarters.

I have been selling these papers for more than five
years. I sell every week. I average about 40 sales per week.

Affidavit of Jack Lieberman

I began selling in subway stations -- and even on subway trains - years ago. I have sold hundreds of copies of The Militant and Young Socialist in subway facilities. Recently, more than half my sales have been there.

Subway stations have four qualities which make them highly favorable places for me to sell papers. First, they contain large concentrations of working class and lower income people, and these are the kinds of people who are most receptive to The Militant and Young Socialist and to my party's ideas, programs and candidates.

Second, the subway stations are protected from the weather. I learned long ago that it is practically impossible to sell on the streets on rainy days or during the winter. In bad weather people will not stop to talk or to search around in their pockets for a quarter. Also, when selling outdoors on rainy days it is impossible for me to keep the supply of papers dry.

Third, subway stations contain a substantial number of people who are waiting around with little to do. This includes people who are waiting for trains or are patronizing the lunch counters, shops and similar facilities that are found in many of the stations.

Fourth, as of the last few months, subways are the only place where I have significant time to sell papers. I have been so busy with other matters that I have had little opportunity to stand on the street or other possible selling locations. However, I spend a substantial amount of time in subway facilities for the purpose of travelling about the city to attend meetings and on other business, and I can use this time for selling papers.

Affidavit of Jack Lieberman

My method of selling is to hold the papers in my hand so as to display the front page and headlines. I offer them for sale to nearby individuals. If a person seems interested, I try to talk to him or her about the contents of the papers and about socialist ideas in general. I try to win them to my point of view and that of my party. Sometimes a headline or photograph on the front page stimulates people into initiating discussions with me. Often these discussions result in a sale. Sometimes a purchaser will look over the purchased paper and then come back to me to discuss its contents. These discussions give me a valuable opportunity to explain my party's ideas to people who have no knowledge of them or who have an imperfect understanding of them.

In early December of 1974, I entered the IRT station at 110th Street and Broadway to travel to a movie. While I was waiting for the train, I began offering copies of The Militant for sale in my usual manner. This was around 8 or 9 o'clock P.M., and the station was by no means crowded. A transit policeman in uniform came up and ordered me to stop selling in the station. He said he would give me a ticket if I did not stop selling. I stopped selling.

I previously had similar experiences, and other members of my party have told me that they have too.

Through our local headquarters, we consulted lawyers as to our rights and as to what we should do. In January, 1975, we were advised that further selling could result in tickets or even arrest and that we should stop selling in subways until the matter

Affidavit of Jack Lieberman

could be resolved through legal channels. I have not sold papers in subway facilities since then.

On January 28, 1975, we wrote, through counsel, to the Transit Authority and Transit Police Chief, requesting that they instruct the policemen not to interfere further with our sale of papers. A copy of the letter is annexed as Exhibit A. Our request was denied by letter of John G. deRoos, General Counsel of the New York City Transit Authority, dated February 13, 1975, copy annexed as Exhibit B.

I desire to resume selling in subway facilities immediately. I am particularly interested in selling in some of the larger stations such as Times Square, Grand Central and Union Square in Manhattan. I have observed these stations. They are spacious, underground areas containing a variety of facilities and features. In addition to the platforms where passengers await their trains, there are passageways and open areas lined with shops, newsstands, shoe shine stands, telephone booths, vending machines, lockers, lunch counters and so forth.

Sometimes the stations are crowded and busy and at other times they are not. Sometimes they are nearly deserted. The people in some areas of the stations, such as passageways, are generally moving. In other areas, such as near the shops, lunch counters and train platforms, the people are more or less stationary.

S/

JACK LIEBERMAN

Sworn to before me, this
24 day of February, 1975.

S/

HERBERT JORDAN
NOTARY PUBLIC
No. 31-4506163
in N. Y. County
Commission Expires March 30, 1975

EXHIBIT A to LIEBERMAN AFFIDAVIT

RABINOWITZ, BOUDIN & STANDARD
ATTORNEYS AT LAW
30 EAST 42ND STREET
NEW YORK, N. Y. 10017
OXFORD 7-8610

VICTOR RABINOWITZ
LEONARD B. BOUDIN
MICHAEL B. STANFORD
JOAN GOLDBERG
DORIAN DOWMAN
MICHAEL KRINSKY
R. WANDLETT WALSTER
HERBERT JORDAN
ERIC N. LIEBERMAN

CABLE: RABOUDIN
430 NATIONAL PRESS BUILDING
8TH AND F STREETS N.W.
WASHINGTON, D. C. 20004
(202) 628-4347

January 28, 1975

Certified Mail
Return/Receipt/Requested

New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

Chief of Transit Police
370 Jay Street
Brooklyn, New York 11201

Dear Sirs:

We represent members of the New York Local of the
Socialist Workers Party.

As an important method of attempting to build support
for their party, its policies and candidates, our clients sell
copies of The Militant in person on the streets and other public
places. The Militant is a socialist news weekly which in recent
years has supported the ideas, policies and candidates of our
clients' party. It sells for 25 cents.

Our clients wish to sell copies of The Militant from
time to time in some of the larger subway stations such as
Times Square and Union Square. The manner of selling would be
for an individual to display the papers by hand, and to converse
with persons who pause to purchase or look. Naturally, our
clients are willing to observe any reasonable regulations as to
the precise time and place of selling within the stations, if
any such regulations exist.

We have advised our clients that the First Amendment
guarantees them the right to sell their papers in person in the

EXHIBIT A to LIEBERMAN AFFIDAVIT

New York City Transit Authority
Chief of Transit Police

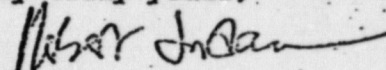
- 2 -

Jan. 28, 1975

subway stations, and they desire to do so immediately. However, some of our clients have recently attempted to sell The Militant in the stations and have been ordered to stop by transit police officers.

Our clients request that you instruct the transit police officers not to interfere with them as they sell their papers in the manner described above. As our clients desire to avoid further incidents with the officers, they will not attempt to sell papers in the stations for the time being. Please give this matter prompt attention and notify us of your action.

Very truly yours,


Herbert Jordan

HJ:sw

EXHIBIT B to LIEBERMAN AFFIDAVIT

M

New York City
Transit
Authority

370 Jay Street Brooklyn, New York 11201 Phone 212 252-5000

David L. Yunich
Chairman and
Chief Executive Officer

Lawrence R. Bailey
Leonard Braun
William L. Butcher
Donald H. Elliott
Justin N. Feldman
Herold L. Fisher
Mortimer J. Gleason
Edwin G. Michasian
Eban W. Pyne
Constantine Sidamon-Eristoff

John G. deRoos
General Counsel

February 13, 1975

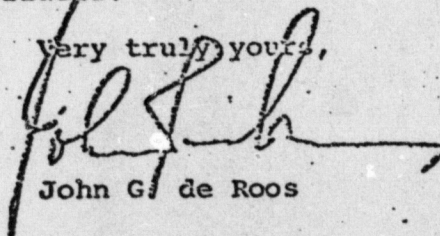
Herbert Jordan, Esq.
Rabinowitz, Boudin & Standard, Esqs.
30 East 42nd Street
New York, N. Y. 10017

Dear Mr. Jordan:

This is in reply to your letter of January 28th in which you request that we advise our Transit Police not to interfere with the sale of "The Militant" by your clients in certain subway stations.

The sale of "The Militant" in the manner you propose is prohibited by Transit Authority regulations. (21 NYCRR Part 1051.) Due to the confined space in the subways, a free flow of passenger traffic must be maintained in order to secure the safety of our riders. Your proposed method of sale would interfere substantially with this traffic flow, and thereby create hazardous conditions for subway riders.

Very truly yours,



John G. de Roos

Answer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

PAT WRIGHT and JACK LIEB ERMAN,

Plaintiffs,

-against-

Civil Action No.
75 C 272

CHIEF OF TRANSIT POLICE, and CHAIRMAN
and MEMBERS OF THE BOARD OF THE
NEW YORK CITY TRANSIT AUTHORITY,

ANSWER

Defendants.

-----x

The defendants, by their attorney, in answer to the complaint allege:

FIRST: Denies each and every allegation contained in the paragraphs
1, 2, 5, 17 and 18 of the complaint.

SECOND: Denies knowledge or information sufficient to form a belief as
to the truth of the allegations contained in paragraphs 3, 6, 7, 8, 9, 10, 11,
13, 16 and 19 of the complaint.

THIRD: Denies each and every allegation contained in paragraph 4 of the
complaint except admits that the named defendants are the Chief of the Transit
Police, and the Chairman and Members of the Board of the New York City
Transit Authority, whose principal office is at 370 Jay Street, Brooklyn, N. Y.

FOURTH: Denies each and every allegation contained in paragraph 12 of
the complaint except admits that there are 416 subway stations, some of
which are underground, and some of which contain concessions where safety
and efficiency permit, and that approximately four million passengers are
carried daily.

FIFTH: Denies each and every allegation contained in paragraphs 14
and 15 of the complaint except admit that a letter dated January 28, 1975 was
sent to the Transit Authority (Lieberman affidavit, Exhibit A), and that a reply

Answer

thereto, dated February 13, 1975 was sent by Mr. John G. de Roos to inform counsel for plaintiffs, Mr. Jordan, that the proposed method of sale would violate Authority regulations, and would create hazardous conditions for subway riders. A copy of this letter is annexed hereto and marked Exhibit I.

FOR A FURTHER AND SEPARATE
DEFENSE, DEFENDANTS ALLEGE:

SIXTH: This Court lacks jurisdiction under 28 U. S. C. §1331 because the amount actually in controversy is less than ten thousand dollars exclusive of interest and costs.

FOR A FURTHER AND SEPARATE
DEFENSE, DEFENDANTS ALLEGE:

SEVENTH: The New York City Transit Authority, a public benefit corporation created pursuant to §1201 of the Public Authorities Law, is not a "person" within the meaning of 42 U. S. C. §1983. Therefore, this Court lacks jurisdiction under 28 U. S. C. §1343(4).

FOR A FURTHER AND SEPARATE
DEFENSE, DEFENDANTS ALLEGE:

EIGHTH: The Transit Authority does not prohibit the sale and distribution of plaintiffs' newspaper. However, the proposed method of sale and distribution is proscribed by New York Penal Law §240.35(7) as well as by Transit Authority regulation.

WHEREFORE, the defendants respectfully request a judgment dismissing the complaint in its entirety.

Dated: March 18, 1975

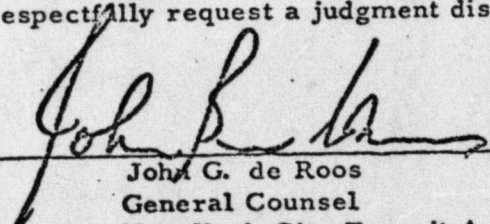

John G. de Roos
General Counsel
New York City Transit Authority
370 Jay Street
Brooklyn, N. Y. 11201

Exhibit 1 to Answer

M

**New York City
Transit
Authority**

370 Jay Street Brooklyn, New York 11201 Phone 212 352-5000

David L. Yunich
Chairman and
Chief Executive Officer

Lawrence R. Bailey
Leonard Braun
William L. Butcher
Donald H. Elliott
Justin N. Feldman
Harold L. Fisher
Mortimer J. Gleeson
Edwin G. Michaelian
Eben W. Pyne
Constantine Sidamon-Eristoff

John G. deRoos
General Counsel

February 13, 1975

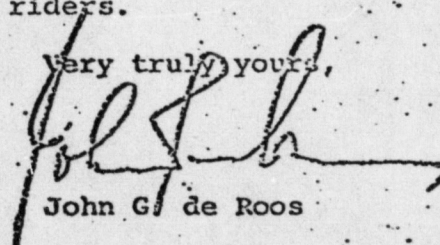
Herbert Jordan, Esq.
Rabinowitz, Boudin & Standard, Esqs.
30 East 42nd Street
New York, N. Y. 10017

Dear Mr. Jordan:

This is in reply to your letter of January 28th in which you request that we advise our Transit Police not to interfere with the sale of "The Militant" by your clients in certain subway stations.

The sale of "The Militant" in the manner you propose is prohibited by Transit Authority regulations. (21 NYCRR Part 1051.) Due to the confined space in the subways, a free flow of passenger traffic must be maintained in order to secure the safety of our riders. Your proposed method of sale would interfere substantially with this traffic flow, and thereby create hazardous conditions for subway riders.

Very truly yours,



John G. de Roos

EXHIBIT 1

Defendants' Affidavit in Opposition to
Plaintiffs' Motion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs,

-against-

Civil Action
No. 75 C 272

CHIEF OF TRANSIT POLICE, and
CHAIRMAN and MEMBERS OF THE
BOARD OF THE NEW YORK CITY
TRANSIT AUTHORITY,

Affidavit in Opposition
to Plaintiffs' Motion for
a Preliminary Injunction

Defendants.
----- x

STATE OF NEW YORK)
 : ss. :
COUNTY OF KINGS)

JOHN G. de ROOS, being duly sworn, deposes and says:

1. I am the General Counsel of the New York City Transit Authority hereinafter the "Authority", a public benefit corporation created pursuant to §1201 of the New York Public Authorities Law.
2. A letter dated January 28, 1975 was sent to the Authority by counsel for plaintiffs, Herbert Jordan, Esq. with regard to the plaintiffs' proposed method of sale of a newspaper, "The Militant".
3. A response, dated February 13, 1975, was sent to inform counsel for plaintiffs that the proposed method of sale was in violation of Transit Authority regulations and, in addition, would interfere with the free flow of passenger traffic, thereby creating hazardous conditions for subway riders.
4. The proposed method of sale of plaintiffs' newspapers is proscribed by N.Y. Penal Law, §240.30(7), formerly §1990-a, adopted in 1939.

Defendants' Affidavit in Opposition to
Plaintiffs' Motion

5. This statute and the Authority's regulations have been uniformly enforced against all unauthorized sales and solicitation; therefore, plaintiffs have not been arbitrarily singled out. Their method of sale is governed by the relevant statute and Authority Rules.

6. The Transit Police Department, created pursuant to PAL §1204 (16) is charged with the obligation to "regulate, direct, control, and restrict pedestrian traffic; remove all nuisances; enforce and prevent violation of all laws and ordinances. "

7. The subways, which carry over 4 million passengers daily, are an inappropriate place for the unauthorized sale and peddling of any article.

8. Plaintiffs, moreover, are not prevented from selling their newspapers through the already existing newsstands located in the subways, where safety and convenience permit.

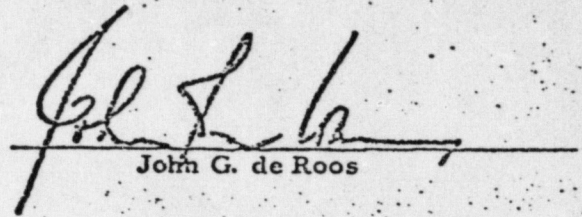
9. These newsstands are leased to Ancorp National Services, Inc., which operates certain newsstands directly and sub-leases others to their licensees. The newsstands accept, and will continue to accept any newspapers, magazines and periodicals of any political or social content, as long as they are not obscene within the meaning of the law (Exhibit 1).

10. To allow the sale of newspapers in the manner proposed by the plaintiffs would open the confined areas of the subway system to all who desired to sell periodicals in a like manner and would endanger passengers using such transit facilities. There would be nothing to prevent sellers of other newspapers, to say nothing of other forms of merchandise, from doing the same.

11. Through its contract with Ancorp National Services, Inc., the Transit Authority derives needed revenue from the sale of newspapers, periodicals and other items which are sold upon its premises. The Authority rightfully derives funds from these concessions pursuant to the provisions of New York Public Authorities Law §1204(13).

Defendants' Affidavit in Opposition to
Plaintiffs' Motion

12. Therefore, the deponent respectfully requests an order denying plaintiffs' motion in its entirety.


John G. de Roos

Sworn to before me this

17th day of March, 1975

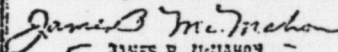

JAMES P. MCMAHON
Notary Public, State of New York
No. 24-7352760
Qualified in Kings County
Commission Expires March 30, 1976

EXHIBIT 1 to DEFENDANTS AFFIDAVIT

Ancorp National Services, Incorporated
477 Madison Avenue, New York, N.Y. 10022
Telephone (212) 838-1100



Office of the Secretary

March 6, 1975

Honorable John G. de Roos
General Counsel
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

Dear Mr. deRoos:

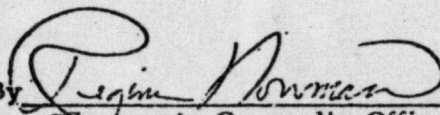
In answer to your inquiry as to the policy observed by Ancorp National Services, Inc., with respect to the sale and distribution of newspapers, periodicals, etc., on the newsstands operated by Ancorp National Services, Inc., please be advised that the newsstands operated by us directly and the newsstands operated by our licensees have accepted, now accept and will continue to accept newspapers, periodicals, etc. of any political or social content provided these newspapers and periodicals, etc. are not obscene within the meaning of the law.

Moreover, should any person desire a license to operate one of our newsstands, and should there be one available, and should the proper financial terms be agreed upon, no one will be barred, nor to the best of my knowledge has anyone ever been barred, nor do we now bar any proper business arrangement.

If there is any further information that you may desire with respect to our policy of operation, please do not hesitate to call upon us.

Very truly yours,

ANCORP NATIONAL SERVICES, INC.

By 
(Corporate Counsel's Office)

RN:ms

EXHIBIT 1

scribed by N.Y. Penal Law, § 240.50(1), formerly § 240.50, adopted in 1972

(Memorandum and Order)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
PAT WRIGHT and JACK LIEBERMAN, :

Plaintiffs, :

-against- :

CHIEF OF TRANSIT POLICE, and :
CHAIRMAN and MEMBERS OF THE :
BOARD OF THE NEW YORK CITY :
TRANSIT AUTHORITY, :

Defendants. :

No. 75 C 272

April 4, 1975

----- x
MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The plaintiffs, by Notice of Motion, filed February 24, 1975, apply for a preliminary injunction, restraining the defendants and their representatives from interfering with the sale by the plaintiffs of copies of "The Militant" and/or "Young Socialist" newspapers in New York City subway stations.

THE COURT LACKS JURISDICTION
OF THE ACTION

The Court lacks jurisdiction under 28 U.S.C. 1331 and 1343(4) in that the controversy does not exceed

Memorandum and Order

2.

\$10,000, also that the New York City Transit Authority is not a "person" within the meaning of 42 U.S.C. 1983.

See *Monroe v. Pape*, 365 U.S. 167, 187; *Sams v. New York State Board of Parole, et al.*, 352 F. Supp. 296, appeal dismissed by Circuit 2 on December 11, 1972, and *Bennett v. Cravelle*, 323 F. Supp. 203, affirmed in 451 F.2d 1011, cert. denied 407 U. S. 917.

THE PLAINTIFFS, HAVING FAILED TO
DEMONSTRATE IRREPARABLE INJURY,
ARE NOT ENTITLED TO A PRELIMINARY
INJUNCTION.

See *Hull v. Petrillo*, 439 F.2d 1184, Cir. 2;
Wulp v. Corcoran, 454 F.2d 826, Cir. 1; *Kissinger v. New
York City Transit Authority*, 274 F. Supp. 438, (S.D.N.Y.)

FIRST AMENDMENT RIGHTS MAY BE
REGULATED AS TO THE TIME, PLACE
AND MANNER OF THEIR EXERCISE.

Section 240.35(7) of The New York Penal Law
provides, in part:

"A person is guilty of loitering when he:
"Loiters or remains in any transportation
facility, unless specifically authorized
to do so, for the purpose of soliciting
or engaging in any business, trade or
commercial transactions involving the
sale of merchandise or services."

Memorandum and Order

3.

22 New York Codes, Rules and Regulations,
Section 1051, provides, in part:

"1051.9 Photographs, peddling, etc.
(a) No person shall in any transit
facility or upon any part of the
New York City transit system, exhibit,
sell or offer for sale, hire, lease
or let out any object or merchandise,
or anything whatsoever, whether corp-
oreal or incorporeal."

See *Wolin v. Port of New York Authority*, 392 F.2d
83, Cir. 2, cert. denied 393 U.S. 940; *Lehman v. City of*
Shaker Heights, 418 U.S. 298; *Lloyd v. Tanner*, 407 U.S. 531;
Grayned v. City of Rockford, 408 U.S. 104 and *U.S. v.*
O'Brien, 391 U.S. 367, 377.

Upon due deliberation, it is ordered that the
motion be and it is hereby denied.

Copies hereof will be forwarded to the attorneys
for the parties.

/s/ WALTER BRUCHHAUSEN

Senior U. S. D. J.

Notice of Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs,

- against -

CHIEF OF TRANSIT POLICE and :
CHAIRMAN and MEMBERS OF THE BOARD
OF THE NEW YORK CITY TRANSIT AUTHORITY, :

Defendants.

Notice is hereby given that, pursuant to 28 U.S.C. § 1292(a) (1), plaintiffs Pat Wright and Jack Lieberman appeal to the United States Court of Appeals for the Second Circuit from the order entered on April 4, 1975, denying the said plaintiffs' motion for preliminary injunction.

Her Jean

Herbert Jordan
RABINOWITZ, BOUDIN & STANDARD
BILL OF RIGHTS FOUNDATION
Attorneys for Plaintiffs
30 East 42nd Street
New York, New York 10017
Tel. No.: (212) OXford 7-8640

Dated: New York, New York
April 8, 1975.